

1 BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

2 STATE OF MONTANA

3 \* \* \* \* \*

4 EILEEN CUMMINGS,

)

5 Appellant,

)

6 vs.

)

OSPI 191-90

)

DECISION AND ORDER

)

7 TRUSTEES, RAVALLI COUNTY  
8 SCHOOL DISTRICT NO. 15-6,

|

)

9 Respondent.

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\* \* \* \* \*

10 STATEMENT OF THE CASE

11 This matter concerns the appeal of Eileen Cummings, a part-  
12 time non-tenured teacher. On August 7, 1990, Greg Danelz, Acting  
13 Ravalli County Superintendent of Schools dismissed the  
14 Petitioner's appeal on the grounds that "this appeal on the  
15 surface appears to be untimely filed."

16 DECISION AND ORDER

17 The dismissal was affected by error of law. The County  
18 Superintendent concluded the appeal involved section 20-4-206,  
19 MCA. This Superintendent believes Cummings was appealing the  
20 Trustees' July decision denying her collective bargaining  
21 grievances. However, since there was no stipulation of facts or  
22 hearing held, the dismissal was premature. This matter is  
23 remanded for further proceedings in accordance with this  
24 decision.  
25

MEMORANDUM OPINION

Standard of Review

The standard of review by the State Superintendent is set forth in section 10.6.125, ARM. This rule was modeled upon section 2-4-704, MCA, and the Montana Supreme Court has interpreted the statute and the rule to mean that agency (County Superintendent) findings of fact are subject to a clearly erroneous standard of review and that conclusions of law are subject to an abuse of discretion standard of review. Harris v. Bauer, 230 Mont. 207, 749 P.2d 1068, at 1071, 45 St. Rptr. 147, at 151, (1988). Further, the petitioner for review bears the burden of showing that they have been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents of Higher Education, 220 Mont. 214, at 217, 714 P.2d 151, at 153 (1986). Findings are binding on the court and not "clearly erroneous" if supported by "substantial credible evidence in the record." Id. This has been further clarified to mean that a finding is clearly erroneous if a "review of the record leaves the court with the definite and firm conviction that a mistake has been committed." Wage Appeal of Montana State Highway Patrol Officers v. Board of Personnel Appeals, 208 Mont. 33, 676 P.2d 194, at 198 (1984).

The opinion of the County Superintendent was not the result of an evidentiary hearing. The record contains no evidence. The "facts" argued in briefs of counsel before this Superintendent are contained in attachments to a motion to dismiss filed after

1 the County Superintendent had dismissed the case. Reference is  
2 made to those documents to determine the details and chronology  
3 of events in order to expedite this matter.

4 **It** appears from the documents that there were two simultaneous  
5 actions: one falling under the terms of the collective  
6 bargaining agreement (CBA); and one under the provisions of  
7 section 20-4-206, MCA.

8	<u>CBA</u>	<u>20-4-206</u>
9	3/6 - grievance	3/8 - non-renewal notification
10	3/13 - grievance	3/22 - non-renewal of contract
11	4/23 - grievance denial	
12	5/1 - appeal to board	
13	7/12 - agreement and board	
14	affirmation of denial	
15	of grievances	

16 On August 1, 1990 Cummings filed an appeal with the County  
17 Superintendent based on "the decision of the Respondent to deny  
18 her grievances over her non-renewal and the District's failure to  
19 properly evaluate her according to the terms of the Collective  
20 Bargaining Agreement." A copy of the July 12, 1990 agreement and  
21 board affirmation of denial of the collective bargaining  
22 grievances was attached to the appeal. The agreement waived  
23 steps 3 and 4 of the grievance procedure. Although the  
24 collective bargaining agreement is not part of the record, the  
25 assumption is that this was an exhaustion of the remedies  
afforded under the collective bargaining agreement.

When a party has exhausted the contractual grievance

1 procedure, the next step is to appeal to the County  
2 Superintendent. This step has been made clear by the Supreme  
3 Court in Canyon Creek Education Association v. Board of Trustees.  
4 Yellowstone County School District No. 4, \_\_\_ Mont. \_\_\_, 785  
5 P.2d 201, 47 St. Rptr. 93 (1990):

6 . . . . unless a claimant's cause of action falls under  
7 the three exceptions enumerated in Throssell [v. Board of  
8 Trustees of Gallatin School District No. 7, \_\_\_ Mont.  
9 \_\_\_, 757 P.2d 348, 45 St. Rptr. 1228 (1988)], he/she must  
10 present his/her claim to the County Superintendent,  
11 invoking and completing the administrative process first  
12 before resorting to the courts.

13 The final decision of the Board of Trustees denying the  
14 grievances, affirmed in the agreement of July 12, 1990, made that  
15 matter ripe for appeal. The final decision on the statutory  
16 non-renewal was March 22, 1990. Sections 20-3-210, 20-4-206,  
17 10.6.102 ARM.

18 The matter is remanded to the County Superintendent for  
19 further proceedings on the issue of timeliness of the appeal on  
20 the alleged breach of contract. If it is found that the appeal  
21 was timely filed, the County Superintendent has jurisdiction to  
22 hear the matter of the alleged breach of contract.

23 DATED this 15 day of February, 1991.

24 Nancy Keenan  
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 15<sup>th</sup> day of February, 1991,  
a true and exact copy of the foregoing DECISION AND ORDER was  
mailed, postage prepaid, to the following:

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